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Alton H. Piester, LLC and Darrell Chapman. Case 11–CA–21531

November 28, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On December 30, 2010, Administrative Law Judge Mary Miller Cracraft issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief and cross-exceptions and a supporting brief.

The National Labor Relations Board has reviewed the supplemental decision¹ and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Supplemental Order.

¹ Although the underlying case, *Alton H. Piester, LLC*, 353 NLRB 369 (2008), enf'd. 591 F.3d 332 (4th Cir. 2010), was decided by only two Board members, the court's order and mandate upholding that decision became final prior to the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010), holding that a two-member group may not exercise delegated authority when the membership of the group falls below three. In these circumstances, we regard the matters finally resolved by the court of appeals as res judicata in this proceeding. See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374–378 (1940); *Nemaizer v. Baker*, 793 F.3d 58, 65 (2d Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1377 (2010)).

² In its memorandum in support of exceptions, Respondent argues that because it discharged drivers Ronald Hasty, James Siebert, and Emanuel Griffin when their driving records prompted the insurance company to threaten to add a surcharge to the premium or threaten Respondent with the loss of coverage altogether, backpay for Darrell Chapman should toll in June 2007 when the insurance company threatened the same action were Chapman reinstated. We disagree. As the judge noted, the Company tolerated Chapman's driving record prior to his unlawful discharge and therefore, but for his unlawful discharge and despite his driving record, Chapman would have remained employed. In that circumstance, there is no merit in the Company's contention that the same driving record that the Company tolerated prior to the unlawful discharge can now excuse the Company from fully complying with the reinstatement order. For this reason, and because the facts underlying the four discharges differ significantly, we reject Respondent's argument.

Significantly, Respondent provided no reason why it did not attempt to reconcile its insurance concerns with the backpay order, i.e., Respondent did not inform the existing carrier it had been ordered to reinstate Chapman or seek alternative coverage. See *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 408 (5th Cir. 1984) (claim that drivers were uninsurable not proven where "the Company admittedly did not question or attempt to appeal its insurance carrier's stated intention to exclude the drivers from insurance coverage, and that the Company failed

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, Alton H. Piester, LLC, Newberry, South Carolina, its officers, agents, successors, and assigns, shall make Darrell Chapman whole by paying him \$72,538.47, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

Dated, Washington, D.C. November 28, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Shannon R. Meares, Esq., for the Acting General Counsel.
Charles F. Thompson Jr., Esq., of Columbia, South Carolina,
for the Respondent.

SUPPLEMENTAL DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. By decision of September 30, 2008, the National Labor Relations Board found, inter alia, that Alton H. Piester, LLC (Respondent) unlawfully discharged Charging Party Darrell Chapman (Chapman) in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).¹ A dispute having arisen regarding the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 11 of the NLRB issued a compliance specification and notice of hearing setting forth backpay for a closed backpay period from April 2, 2007 (the

to show that such an appeal would have failed"); see also *Golden Beverage of San Antonio*, 256 NLRB 469, 473 (1981) (employer's failure to explore alternate insurance carriers warranted a reinstatement order). In these circumstances, the judge reasonably found that Chapman would have remained employed throughout the backpay period contrary to the Respondent's contentions. See generally *Overseas Motors Inc.*, 277 NLRB 552, 557–558 (1985), remanded on other grounds 818 F.2d 517 (6th Cir. 1987).

We find it unnecessary to pass on the judge's alternative reasoning that even had Chapman been ineligible for reinstatement in June 2007, he would have regained eligibility in November 2007 when a 3-year-old incident would no longer be held against him for insurance purposes.

¹ *Alton H. Piester, LLC*, 353 NLRB 369 (2008), enf'd. 591 F.3d 332 (4th Cir. 2010).

date of Chapman's discharge) to June 14, 2010 (the date for response to Respondent's unconditional offer of reinstatement).

Although Respondent does not contest the formula or the accuracy of the figures utilized in the backpay specification, Respondent asserts that the Acting General Counsel arbitrarily utilized the wrong employees for comparison purposes and, in any event, Respondent asserts that because of his driving record, Chapman was ineligible for rehire at least by the end of the second quarter of 2007. This case was tried in Newberry, South Carolina, on October 18, 2010.

Respondent is a trucking company. Its drivers haul loads as assigned by Respondent. They are compensated weekly based upon a percentage of the loads that they haul. Some loads pay more than others. The backpay specification calculates Chapman's gross backpay based upon the average earnings of the two highest-earning drivers per calendar quarter. The Acting General Counsel asserts that this amount is appropriate because Chapman's predischarge quarterly earnings were consistently ranked among the top two highest.

Indeed, disregarding the partial quarter when Chapman began employment (the first quarter of 2006) and the partial quarter when Chapman was discharged (the second quarter of 2007), in three of the remaining four quarters (the third and fourth quarters of 2006 and the first quarter of 2007); Chapman was always either the highest or second highest-paid driver. During the second quarter of 2006, Chapman ranked 7th of 14 drivers. Piester explained that Chapman had a family to support and he was willing to work hard. Additionally, Piester opined that because loads vary in the amount of pay, Chapman may have been in the right place at the right time for some of the better paying loads. Utilizing the average earnings of the two highest earning drivers per calendar quarter, Regional Compliance Officer Jenn Dunn calculated net backpay² in the amount of \$72,538.47 for the closed backpay period.

In its amended answer to the backpay specification, Respondent asserts that selection of the two highest paid drivers for calculation of Chapman's backpay is arbitrary because driver pay fluctuates greatly and, therefore, the average of all drivers' pay should be utilized. Respondent asserts that utilizing all drivers' pay results in net backpay of \$21,068.

As the compliance officer noted during her testimony, however, utilizing all drivers' pay includes drivers who did not work for the entire quarter. For instance, during the second quarter of 2006, 7 of 14 drivers did not work each of the 13 weeks. Two of the seven worked 12 weeks, one worked 5, one worked 3, and three worked 1 week of the quarter. Chapman, however, worked each of the 13 weeks. Examination of pay for the third and fourth quarters of 2006, as well as the first quarter of 2007, reveals similar discrepancies. Unlike *Mash Transportation*, 293 NLRB 404 (1989), here the General Counsel has set forth a legitimate reason for using the average of the top grossing drivers as opposed to the average of all drivers. Thus, under these circumstances, I find that utilizing the pay of all driv-

ers for each quarter is not reasonable and I reject Respondent's argument that I do so.

Respondent's Exhibits 1 and 2 purport to show that the drivers' salaries fluctuated a great deal between quarters, however, as a general matter the exhibits tend to show that the drivers earned more as their tenure lengthened. Many of the drivers did fluctuate in their standing in the pay rankings, however, generally the driver's rankings improved over time. Additionally, the rankings and earnings do not show the number of weeks each driver was working nor does it show the work ethic of the drivers. Respondent explained during the hearings that some drivers chose to work more than others which impacted their earnings. It seems that the higher earning drivers tended to stay at the top of the pay rankings. In fact, this pattern is evidenced by several drivers including Pathetty Wright who Respondent used as an example of fluctuating pay. Wright consistently improved his pay rank despite a few deviations during the beginning of his employment with Respondent. In fact, after the first five quarters of his employment with Respondent, Wright maintained either the first or second highest paid driver position. This seems consistent with the General Counsel's contention that Chapman would have continued improving his rank and would have remained at the top of the pay scale.

Respondent's Exhibits 3 and 4 proposed alternative calculations for backpay. Respondent's Exhibit 3 illustrates the backpay owed if it is calculated by using the average of all drivers' earnings during the relevant period. As described above, I find that it is unreasonable to use this calculation because it is not demonstrative of the actual earning potential of the drivers. This figure includes both the first and last quarter of each driver's employment which significantly reduces the average pay. Exhibit 4 attempts to resolve this problem by removing the first and last quarter of each driver's earnings but still averaging the earnings of all drivers during the relevant period. This figure too, fails to represent the earnings that Chapman would have earned because it includes drivers who only worked for a couple weeks during each quarter. This calculation is not reasonable because it fails to take into consideration one of the most important factors in a driver's earnings: his work ethic. During the course of the hearing the General Counsel established that Chapman was working in order to take care of his family and that he was particularly committed to earning as much money as possible. It is not equitable to compare him to the lowest wage earners because he demonstrated his willingness to work and his ability to remain among the highest earners. As such, the calculations put forth by Respondent are unreasonable.

Similarly, I find that utilizing the pay of the top two drivers is reasonable and serves the purpose of backpay. Although during Chapman's first full quarter of employment (the second quarter of 2006), his earnings were 7th of 14 drivers, Chapman was the top earning driver during the third and fourth quarters of 2006 and earned the second highest amount during the first quarter of 2007. Many of the drivers who were top earners during these quarters and the quarters following Chapman's discharge remained the same. Based upon these numbers and the consistency of the top earners remaining at the top, I find

² Additional commuting expenses and reduced vacation benefits were treated as offsets to gross interim earnings. Chapman's net interim earnings were then deducted from gross backpay to calculate net backpay. None of these figures and calculations is in dispute.

that utilizing the average of the two top earning drivers to determine Chapman's gross backpay was reasonable. Additionally, this calculation takes in to consideration that the average pay of all workers declined during the backpay period.

The courts and the Board "have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay." *Performance Friction Corp.*, 335 NLRB 1117 (2001). The Acting General Counsel may utilize any method that places the discriminatee in the same position he would have been in absent the unlawful actions by the employer as long as the method is not unreasonable or arbitrary. *Id.*, citing *La Favorita, Inc.*, 313 NLRB 902, 903 (1994) enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Any ambiguities, doubts, or uncertainties are resolved against Respondent, the wrongdoer, because an offending Respondent is not allowed to profit from any uncertainty caused by its discrimination. *Minette Mills, Inc.*, 316 NLRB 1009, 1010-1011 (1995). Given these well established standards, I find the General Counsel's backpay computation method reasonable.

Having rejected Respondent's argument regarding utilizing the top two earning drivers to calculate backpay, I turn to Respondent's argument that Chapman was not eligible for rehiring as of the second quarter of 2007 due to his poor driving record. During the unfair labor practice hearing before Administrative Law Judge Keltner W. Locke, Respondent produced "after-acquired" evidence of Chapman's driving record. It indicated that Chapman had three violations as of second quarter 2007. Counsel for the Acting General Counsel argued that because Respondent had the opportunity to fully litigate this defense to the remedy of reinstatement during the underlying unfair labor practice hearing, Respondent was precluded from relitigating this defense in the compliance hearing.

During the underlying unfair labor practice hearing, Respondent sought to question Chapman about his driving record, including three traffic violations and two predischarge accidents. In a prehearing motion in limine, renewed in brief, counsel for the General Counsel objected to this line of questioning based on laches. Counsel pointed out that because Respondent was aware of these violations and accidents prior to unlawfully discharging Chapman, Respondent should have litigated this matter in the unfair labor practice proceeding because it goes to the remedy to be ordered for the unfair labor practice. Respondent argued that the evidence was relevant to whether Chapman could be reemployed. Upon objection during the unfair labor practice hearing, Judge Locke stated that the issue may be a "matter left for the compliance stage." Nevertheless, Judge Locke also overruled the objection and allowed the line of questioning. However, the evidence regarding the predischarge accidents and violations was not further litigated in the unfair labor practice proceeding. Thus, counsel for the General Counsel argued in her motion in limine before me that Respondent is barred by the doctrine of laches from litigating the reinstatement issue before me because "Judge Locke never precluded nor prohibited Respondent from exploring the issue of Chapman's ability to obtain reinstatement based on his traffic violations and accidents."

I denied the General Counsel's motion to preclude this evidence in the instant compliance proceeding. Although I agree

with the General Counsel's statement of the law: a Respondent with knowledge of an alleged discriminatee's misconduct prior to the unfair labor practice proceeding, must assert this defense to reinstatement at the unfair labor practice hearing,³ I adhere to this ruling denying the motion in limine. I do so for two reasons. First it is not clear to me that Respondent is asserting that reinstatement itself is precluded or that Respondent is asserting only that reinstatement must be delayed until the violations and accidents are removed from Chapman's record due to passage of time. Second, because Judge Locke stated that the matter might be tried in the compliance proceeding, due process requires that I hear this issue.

Turning then to the merits of Respondent's defense to reinstatement of Chapman in light of his driving record, I find that Piester was fully aware of the three violations and two accidents at the time it discharged Chapman. There is no evidence in the record why these accidents and violations had not been reported to the insurance company prior to Chapman's discharge. Respondent did report them soon after Chapman's discharge. The insurance company opined that if Chapman were reemployed, Respondent's insurance premiums would increase. The insurance company makes no decision regarding whether a driver should or should not be hired. Although Respondent presented evidence that it has a practice of refusing to hire drivers if insurance coverage would increase due to their driving record, such evidence does not warrant a finding that Chapman was not eligible for reinstatement in June 2007.

First, Respondent may not now argue that Chapman could not be reinstated due to violations and accidents which would raise the insurance premium when it was perfectly willing to allow these violations and accidents to remain unreported prior to Chapman's discharge. Had it not been for the underlying unlawful termination, Chapman would have continued working for Piester. There is no evidence that the violations and accidents would have been reported. Although Cindi Jackson, Piester's insurance broker at Tidwell Agency, credibly testified, and the evidence shows, that there would have been a surcharge and a potential loss of coverage if Piester were to add Chapman to the plan in June 2007, this problem would not have arisen in the absence of the unfair labor practice. In resolving ambiguities and uncertainties against Piester as the wrongdoer,⁴ I find that Chapman would have remained employed and is entitled to backpay from the date of his termination in April 2007.

Piester's insurance rates were directly linked to the driving records of the truckdrivers. Any time the insurance company paid out any money the incident was considered "chargeable."⁵ Violations and accidents remain on a driver's motor vehicles report for 3 years from the date of conviction. After 3 years elapse, the violations "fall off" their record and are not considered in calculating insurance rates. To determine insurance rates, the truckdrivers' records are analyzed by the insurance

³ See, e.g., *Bob's Ambulance Service*, 183 NLRB 961 (1970); *Fibreboard Paper Products Corp.*, 180 NLRB 142, 149-150 (1969), enfd. 436 F.2d 908 (D.C. Cir. 1970), cert. denied 403 U.S. 905 (1971).

⁴ *Minette Mills, Inc.*, supra, 316 NLRB at 1010-1011.

⁵ Chargeable incidents can occur whether or not a ticket is issued by law enforcement or whether or not the truckdriver was at fault.

company. When there are more than three violations or accidents on a driver's record, it tends to increase the insurance rate for Piester and Piester will incur a surcharge if he chooses to keep the driver on the plan.

The evidence shows that Piester had a pattern of not hiring employees who would raise the insurance rates, with the one exception of Joe Cagle. In August 2007, Piester inquired as to whether Jonathan Free would be an acceptable driver under the insurance plan. Tidwell informed Piester that Free had four violations on his record and that Piester would incur a surcharge if he chose to add Free to the plan. Piester chose not to hire Free at that time but did hire him at a later date when some of the violations came off his record. In January 2008, Dexter Booker applied for a driver position and Piester asked Tidwell if he was acceptable for the plan. Tidwell informed Piester that Booker had two at-fault accidents on his record and thereafter Piester chose not to hire Booker. In July 2008, Joseph Suber was not hired when Tidwell informed Piester that there would be a surcharge for Suber because he had been involved in an accident. On August 27, 2008, Piester asked Tidwell whether John Burton would be acceptable as a driver under the insurance policy. Tidwell informed Piester that Burton had not had his commercial driver's license for over 2 years and therefore, a surcharge would apply. Burton was not added to the policy. In March 2010, Piester inquired as to whether Jamaal Mathis would be an acceptable driver. Mathis had not had his commercial driver's license for more than 2 years and thus would incur a 10-percent surcharge. Piester did not hire Mathis at that time, but did hire Mathis when he reapplied after the 2-year period had elapsed.

The sole exception to this pattern was Joe Cagle. Piester incurred a 10-percent surcharge for Cagle based on his driving record; however, Piester credibly testified that Cagle's primary duties were those of a mechanic and not a driver. Based on the evidence, it seems that the exception for Cagle was specifically due to his position as a mechanic and therefore is not an exception to Piester's practice against insurance rate increases.

However, Piester's pattern is irrelevant. Chapman continued to be employed after his two accidents in January and February 2007. In fact, those two accidents were not reported to the insurance company until after Piester was attempting to mitigate its damages by contemplating offering Chapman a position again. The unlawful termination was the event which subjected Chapman's driving record to be reviewed. In fact, Piester went to great lengths by sending copies of receipts from the damage resulting from Chapman's accidents in early 2007 to the insurance company. The insurance company has not, at any time, stated that Chapman could not be added to the policy, but rather, has consistently stated that adding Chapman would cause the rates to increase or a loss of coverage. There is no evidence that Chapman was unfit to drive. Under these circumstances, Chapman is not unable to work and the General Counsel prevails in showing that Chapman would have continued working but for the unfair labor practice of terminating him in April.

Moreover, Piester had the option to hire Chapman and pay the surcharge as opposed to refusing to hire him. Although there was a possibility that Piester would lose some of his coverage if he hired Chapman, Piester had options and could have found a way to reemploy Chapman in 2007. Chapman was not literally unavailable to work. Rather, Piester simply decided it did not want to pay a surcharge to reemploy Chapman.⁶ Had the underlying termination not occurred, Chapman's driving record would not have been subjected to review in June 2007 and he would have remained employed with Piester.⁷ As the wrongdoer, Piester is responsible for all backpay from the date of Chapman's unlawful termination until its unconditional offer of reinstatement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Alton H. Piester LLC, its officers, agents, successors, and assigns shall make payment to Darrell Chapman in the amount of \$72,538.47 with interest.⁹

Dated, Washington, D.C. December 30, 2010

⁶ Cf. *Consolidated Bus Transit*, 350 NLRB 1064, 1067 (2007) (due to employer's unfair labor practice, employee lacked the requisite certification to drive a bus and was thus entitled to a contingent offer of reinstatement subject to recertification within a reasonable period of time); *Epic Security*, 325 NLRB 772, 774 (1998) (contingent offer of reinstatement pending restoration of license within a reasonable period of time); *DeJana Industries*, 305 NLRB 845 (1991) (no obligation to reinstate discriminatee as a driver until he demonstrates, within reasonable period of time, that he has an appropriate driver's license).

⁷ I further note that even if Chapman had been ineligible for rehire in June 2007, he would not have remained ineligible indefinitely. Chapman's conviction of November 23, 2004 would have fallen off his driving record on November 23, 2007, and he would have been eligible for employment at that time. Normally, if an employee is "unavailable" to work the backpay period is tolled for the time when the employee is unavailable. See *De Jana Industries*, supra, 305 NLRB at 845 (reinstatement with backpay will be awarded if the employee can obtain a driver's license in a reasonable period of time); *Sure-Tan, Inc.*, 234 NLRB 1187, 1193 (1978), *enfd.* in relevant part 672 F.2d 592 (7th Cir. 1982) (backpay is tolled when an employee is incarcerated). However, here it is unnecessary to determine whether tolling is appropriate because Chapman was eligible for rehire in June 2007.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ After issuance of *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), requiring daily compound interest on all backpay and other monetary awards, counsel for the Acting General Counsel requested daily compound interest. Thereafter, *Rome Electrical Systems*, 356 NLRB No. 38 (2010), held that *Kentucky River* does not apply to cases in compliance prior to issuance of *Kentucky River*. Accordingly, counsel for the General Counsel's request to withdraw its motion to amend the compliance specification to include daily compound interest is granted.